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HIGH COURT OF CHHATTISGARH AT BILASPUR

Cr. Appeal No.208/2006

Single Bench: Hon'ble Shri Dilip Raosaheb Deshmukh, J.

Deo Raj @ Debu

Versus

State of Chhattisgarh

Shri Ashok Patil, learned counsel for the appellant.

Shri Ashish Shukla, learned Govt. Advocate for the State/respondent.

ORAL JUDGMENT

(Passed on 27th of April, 2006)

This appeal is directed against the judgment dated 16.02.2006 delivered by Shri V.N. Pandey, learned 2nd Addl. District and Sessions Judge, Distt. Durg (CG) in Sessions Trial No. 208/2004 whereby the appellant was convicted under Sections 363, 366 and 376 IPC and was sentenced to undergo rigorous imprisonment for 3 years and to pay fine of Rs. 1,000/- for each offence under Section 363 and Section 366 IPC and to R.I. for 7 years and a fine of Rs. 3,000/- under Section 376 IPC. All the sentences were ordered to run concurrently.

2. Briefly stated the prosecution story is that on 2.8.2004, the appellant lured the prosecutrix Ku. Shabnam Banu, a girl aged about 15 years to accompany him to his friend's house with an intention to subject her to sexual intercourse. The prosecutrix accompanied the appellant to the house where the appellant committed rape on the prosecutrix. F.I.R. was lodged

on 3.8.2004 vide Ex.P-3 by Mehmood Ali P.W. 3, father of the prosecutrix at P.S. Supela. The prosecutrix was sent for medical examination. Dr. Kavita Srinivasan P.W. 7 examined the prosecutrix on 3.8.2004 and found that secondary sexual characters were well developed. There was no mark of any violence on her body or on the inner parts of thighs. Hymen was ruptured. There was no bleeding in the vagina. No definite opinion about any recent sexual intercourse could be given by Dr. Kavita Srinivasan P.W. 7. Vaginal slides were prepared and the prosecutrix was referred for radiological examination for confirmation of age. Radiological examination was conducted by A.K. Sahu P.W. 5 vide Ex.P-11 who opined that age of the prosecutrix was estimated to be 15 years. For proof of age of the prosecutrix, mark list for the year 1997-98 was seized vide Ex.P-5 showing the date of birth of the prosecutrix to be 1.6.1990. The School Admission Register Ex.P-9 (C) also showed the date of birth of the prosecutrix as 1.6.1990. The appellant was medically examined by Dr. D.C. Jain P.W. 8 who found that the appellant was capable of performing sexual intercourse. However, no definite opinion could be given about recent sexual intercourse having been done by the appellant. After completion of investigation, the appellant was prosecuted.

3. The appellant abjured the guilt, pleaded innocence and led no evidence in defence. The prosecution examined as many as 8 witnesses. The learned trial Judge relying upon the evidence led by the prosecution, convicted and sentenced the appellant as aforesaid in para 1.

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4. Learned counsel for the appellant has argued that the evidence led by the prosecution does not establish the guilt of the appellant under Section 363, 366 and 376 of IPC. It was argued that the prosecution has failed to establish the age of the prosecutrix by leading primary evidence as to prove the date of birth of the prosecutrix. The testimony of Mehmood Ali P.W. 3 in para 5 and the testimony of Salma Begum P.W. 3 in para 2 was referred while arguing that both the parents had absolutely no knowledge about the date of birth of the prosecutrix. The testimony of the prosecutrix in para 5 was also referred to show that the prosecutrix had admitted that her age was 18 to 20 years. It was also contended that the evidence of the prosecutrix left no manner of doubt that she was in love with the appellant and wanted to marry her. Para 6 of her testimony also revealed that she was pressurized to lodge the F.I.R. against the appellant. On these premises, learned counsel for the appellant argued that conviction and sentence awarded by the learned trial Judge deserves to be set aside. On the other hand, Shri Ashish Shukla, counsel appearing for State argued in support of the impugned judgment.

5. Having considered the rival contentions, I have perused the record of Sessions Trial No. 208/2004. Proof of age of the prosecutrix in an offence under Sections 363, 366 & 376 IPC is a material fact to be established by the prosecution by leading legal and cogent evidence. Mehmood Ali P.W. 3, Salma Begum P.W. 2, the parents of the prosecutrix have expressed

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ignorance about the date of birth of the prosecutrix. Prosecutrix Ku. Shabnam Banu P.W. 1 made a positive assertion that her age on the date of evidence was 18-20 years. It is true that Dr. A.K.Sahu P.W. 5 has proved the report of ossification test conducted on the prosecutrix by performing radiological examination which shows an estimation of the age of the prosecutrix as 15 years. It is well settled that there is a legally permissible margin of error of 2 years on either side in the estimation of age given in the ossification test report. Medical examination report of the prosecutrix by Dr. Kavita Srinivasan P.W. 7 also shows that at the time of examination, she found that all secondary sexual characters of the prosecutrix were well developed. The primary evidence i.e. the Kotwari Register of Birth relating to proof of the date of birth of the prosecutrix has not been produced by the prosecution. So far as the entry in the School Admission Register Ex.P-9 (C) of the mark list Ex.P-6 is concerned, it is wholly inconsequential and does not lend any support to the prosecution in view of the fact that both parents have shown complete ignorance about the date of birth of the prosecutrix. It cannot, therefore, be ruled out that the age as mentioned in the above documents is a mere estimation or guess work by the parents. In view of the above facts and circumstances, the possibility that the prosecutrix was aged 18 years or more on the date of occurrence cannot be ruled out.

6. So far as the factum of the alleged rape is concerned, the testimony of the prosecutrix clearly demolishes the

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prosecution case. In examination, she has admitted that she is in love with the appellant and wants to marry him. She has also admitted that she had lodged the report against the appellant upon undue pressure exercised by her parents. She has also admitted in para 7 that she had gone with the appellant of her own volition. In view of the above statement on oath by the prosecutrix, the possibility that sexual intercourse, if any committed on the prosecutrix by the appellant was with her consent, cannot be ruled out.

7. Having thus considered the evidence led by the prosecution in its entirety, I am of the considered opinion that the prosecution has utterly failed to prove the guilt of the appellant under Sections 363, 366 and 376 of IPC. Conviction of the appellant for the aforesaid offences and the sentences awarded thereunder by the learned trial Judge therefore, deserves to be set aside.

8. In the result, this appeal is allowed. Conviction of the appellant under Sections 363, 366 & 376 IPC is set aside. The appellant is acquitted and shall be set at liberty forthwith, if not required in any other case. Fine if paid shall be refunded to the appellant.

Sd/-
Dilip Raosaheb Deshmukh
Judge